Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2125

In the Supreme Court of the United States

October Term, 1981

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

MARGARET HUNTING
Deputy Attorney General
Counsel of Record for Respondent Commonwealth of Pennsylvania
LEROY S. ZIMMERMAN
Attorney General
EMOGENE L. TREXEL
Assistant Counsel
Office of Attorney General

1545 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-5050

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTIONS PRESENTED

1. Whether a federal statute must set forth in sufficient detail the conditions and sanctions imposed in a grant-in-aid program for the potential state grantee to make an informed decision regarding participation and possible liability.

2. Whether a federal grantor agency may disregard the express conditions and sanctions enumerated in a funding statute and create a new voluntary administrative process empowered to demand the return of expended funds.

3. Whether laws which impose sanctions on grantees can be retroactively applied.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Statutes Involved	1
Statement of the Case	4
Summary of Argument	9
Argument	11
Conclusion	18
Appendix A	19

TABLE OF CITATIONS

CASES:

California State Board of Education v. Boyer, No. 78-3385 (9th Cir. Nov. 1, 1979) 7

Greene v. United States, 376 U.S. 149 (1964) 14

New Jersey v. Hufstedler, 662 F.2d 208 (3rd Cir. 1981) 15

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 9, 13, 15

West Virginia v. Commissioner of Education, No. 79-1338 (4th Cir. 1980) 15

STATUTES:

20 U.S.C.A. Sec. 241a (1974) 1, 4, 5

20 U.S.C.A. Sections 241a-241m (1974) (amended Supp. 1982) 4

20 U.S.C.A. Sec. 241c (1974) 4

20 U.S.C.A. Sec. 241e (1974) 5, 11

20 U.S.C.A. Sec. 241f (1974) 5, 11

20 U.S.C.A. Sec. 241f(b) (1974) 2, 5

20 U.S.C.A. Sec. 241j (1974) 2, 3, 5, 11

20 U.S.C.A. Sec. 241k (1974) (amended Supp. 1982) 7

20 U.S.C.A. Sec. 241k(a) (1974) 3

20 U.S.C.A. Sec. 1223 (1978) 1, 2, 5

20 U.S.C.A. Sections 1234-1234e, 2701-2854 (Supp. 1982) 7

20 U.S.C.A. Sections 3401-3510 (Supp. 1982) 4

OTHER AUTHORITIES:

Comptroller General, Federal Agencies Negligent in Collecting Debts Arising From Audits (1982) 16

Rights and Remedies Under Federal Grants 98 (1979) 17

STATUTES INVOLVED

20 U.S.C.A. §241a (1974):

Congressional declaration of policy

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

20 U.S.C.A. §1223 (1978):

Advance appropriation of funds for elementary and secondary education programs

To the end of affording the responsible State, local, and Federal officers concerned adequate notice of available Federal financial assistance for education, appropriations for grants, contracts, or other payments under any applicable program are authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are avail-

able for obligation. In order to effect a transition to this method of timing appropriation action, the preceding sentence shall apply notwithstanding that its initial application under any such Act will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

20 U.S.C.A. §241f(b) (1974):

Assurances from States; action by Commissioner on applications

(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a) of this section and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.

20 U.S.C.A. §241j (1974):

Withholding funds for non-compliance with assurances

Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the

failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.

20 U.S.C.A. §241k (a) (1974):

Judicial review—Jurisdiction

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 241e (c) or 241f (b) of this title or with his final action under section 241j of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

STATEMENT OF THE CASE

In 1965, what was then the Office of Education (OE or the agency) in the Department of Health, Education and Welfare (HEW)[1] began administration of Title I of the Elementary and Secondary Education Act of 1965 (ESEA)[2] the statute which is the subject of the present petition. According to the funding pattern of this law, the Office of Education channeled federal money to local educational agencies (LEAs) through state educational agencies (SEAs). 20 U.S.C.A. §§241a-241c (1974) (amended Supp. 1982). This funding pattern was designed to insure the provision of educational services by the LEAs that the federal government could not itself provide. The program was designed to meet the need perceived by Congress to supplement financially the educational programs in schools where high concentrations of low-income families in the area impaired the ability of the LEA to support adequate educational programs for dis-

[1] The Office of Education was transferred out of the Department of Health, Education and Welfare and became the United States Education Department on May 6, 1980. During the period relevant to this case, the Office of Education administered the Title I program and was headed by a Commissioner of Education. Under the Education Department, the office of Commissioner was replaced by the Secertary of Education. 20 U.S.C.A. §§3401-3510 (Supp. 1982).

[2] Title I of the Elementary and Secondary Education Act of 1965 has been amended extensively over the years, substantially so in 1978 and again in 1981. The law in effect at the time is codified at 20 U.S.C.A. §§241a-241m (1974) (amended Supp. 1982).

advantaged children. 20 U.S.C.A. §241a (1974) (amended Supp. 1982).

In title I, Congress provided a carefully constructed statutory scheme to channel funds to the LEAs by means of payments made to the SEA according to detailed application and payment procedures. 20 U.S.C.A. §§241f, 241e (1974) (amended Supp. 1982). Funds were made available in advance of expenditures in order to afford adequate notice to officials responsible for administering the program of available federal financial assistance. 20 U.S.C.A. §1223 (1978). The utilization of this advance funding method was designed to add certainty to the yearly program implementation so that Congress's goal of overcoming the impact of concentrated poverty on education could be achieved.

The Commissioner of Education was required to assure the proper functioning of the program according to the detailed statutory provisions by restricting the flow of federal money to any noncomplying program. The Commissioner's obligation in this regard was established in 20 U.S.C.A. §241f(b) (1974) (amended Supp. 1982), providing for approval or disapproval of applications; and 20 U.S.C.A. §241j (1974) (amended Supp. 1982), providing for withholding funds. Under §241f, an application must meet certain requirements to be approved; reasonable notice and an opportunity for a hearing had to be provided prior to disapproval. Under §241j, the Commissioner was required to withhold funds where there had been a failure to comply substantially with the Title I law. The funds were to be withheld until the SEA was able to prove to the satisfaction of the Commissioner that the program was in compliance. The withholding section, like the application disapproval section, required

reasonable notice and opportunity for a hearing before utilization of the remedy.

Pennsylvania elected to participate in the Title I program as it was established by this statutory scheme. Between 1966 and 1973, the Pennsylvania SEA applied for and received almost $444,144,000.00 which is disbursed to more than 500 LEAs throughout the Commonwealth on a yearly basis. Each year the Pennsylvania SEA was visited by program officials from the Office of Education who reviewed our administration of the Title I program. Never was there a suggestion that the program was noncomplying, substantially or otherwise, or that funds should be withheld or denied.

In 1971 and again in 1973, the audit agency of HEW conducted a program review of Title I as it was administered in Pennsylvania from 1967 through 1973. In 1975 a report was issued by the audit agency recommending the payment of approximately $10,000,000.00 from the Pennsylvania SEA for Title I programs in seven LEAs. Although these programs were believed by the LEAs to be operated pursuant to the applicable legal requirements, they were found by the auditors to have permitted benefits to inure to ineligible children and schools. At this time, the original $10,000,000.00 figure claimed by the auditors has been reduced to $422,424.29.

With the final audit determination letter, Pennsylvania was notified that it could contest the agency's demand for repayment of funds in a hearing before a body called the Title I Audit Hearing Board. Lacking statutory authority for its creation, the Title I Audit Hearing Board was established voluntarily and operated without published rules according to unpublished guidelines which were

routinely made available to parties appearing before it. No statutory authority required that a hearing be provided in cases where repayment was demanded because no statutory provision existed giving OE the power to demand a refund.

Although the Title I statute permitted an appeal to the United States Circuit Court by an SEA subjected to application disapproval or withholding of funds,[8] no judicial review was available for audit hearing board decisions. Clearly the courts could not exercise jurisdiction over the decisions of a voluntarily established board that existed without statutory authority and that purported to impose penalties unauthorized by statute. *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979).

The Education Amendments of 1978 substantially revised Title I. 20 U.S.C.A. §§1234-1234e, 2701-2854 (Supp. 1982). Sections were added to provide for audit determinations and the collection from the SEA of any amount found to have been misspent under the law. 20 U.S.C.A. §1234a (Supp. 1982). The Education Appeal Board was established to hear disputes between the agency and the SEA regarding allegations of misexpenditures and demands for payment. 20 U.S.C.A. §1234 (Supp. 1982). Procedures, including judicial review of audit findings, were statutorily established. 20 U.S.C.A. §1234d (Supp. 1982).

Regulations implementing the statutory requirements of the Education Appeal Board were finally promulgated in 1979 and this Board assumed jurisdiction over pending

---

[8] 20 U.S.C.A. §241k (1974) (amended Supp. 1982).

Title I audit cases. In the instant case, the Title I Audit Hearing Board provided a hearing on the Pennsylvania audit exception pursuant to its unauthorized procedures and then decided the case with the imprimatur of the statutorily authorized Education Appeal Board.

Recently the Title I law has been substantially revised again and reenacted as Chapter 1 of the Education Consolidation and Improvement Act of 1981. This most recent version of the law is in effect at the present time.

SUMMARY OF ARGUMENT

The United States Office of Education demanded that the Pennsylvania SEA pay from its own sources funds allegedly misexpended by LEAs prior to 1973. Although the law in effect at the time permitted remedies of withholding funds or disapproval of applications when Title I programs were perceived to be improperly implemented, OE sought to use the remedy of repayment which was not authorized by the statute. The Title I statute was subsequently amended in 1978, but it is the law that is in effect when the SEA decides to accept funds under the grant program and the alleged misexpenditures occur that should govern. In this case, the programs at issue were concluded and the funds expended at least five years before the change in the law. An SEA cannot be held to the terms of the statute of which it is unaware at the time of its action. This Court's decision must, therefore, be limited to the Title I statute as it existed prior to 1978.

The opposing decisions of the Third and Fourth Circuit do not require the intervention of this Court for resolution. The Fourth Circuit did not fully consider the issues raised before the Third Circuit and was further influenced by its own prior decision in a similar case. Most importantly, the Fourth Circuit failed to consider this Court's recent decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), and was, therefore, not fully informed of the law.

The Third Circuit's decision is restricted to a narrow issue involving pre-1978 Title I law. Petitioner's claims that the decision will undermine the enforcement mechanism of all grant statutes is unsupported. The enforcement authority of agencies with respect to their statutory grant programs must be determined on a case-by-case basis. The huge sums of federal money asserted by the petitioner as being threatened by the Third Circuit's opinion are also unsupported. Petitioner's argument that expediency requires that these matters be heard by administrative agencies in the first instance is no substitute for the lack of congressional authorization to pursue a repayment remedy.

ARGUMENT

1. Pennsylvania embarked upon the Title I program pursuant to a law that was specific and detailed in laying out the statutory scheme for meeting the objective of providing financial assistance to schools in areas of concentrated poverty. Title I represented not only a carefully structured method for accomplishing educational goals but also an equally specific and carefully constructed scheme for enforcing the specific requirements of the funding program. Under this scheme the Commissioner of the Office of Education as well as the SEA and the LEAs had specific responsibilities for accomplishing their mutual purpose of meeting the objectives of the statute. Whereas LEAs had the responsibility of designing and implementing a conforming program,[4] and the SEA had the responsibility of approving LEA applications and disbursing funds,[5] the Commissioner had the parallel responsibility of either approving or disapproving the SEA's annual applications[6] or of withholding funds to SEAs where substantial noncompliance with the Title I program is found.[7]

This was the law and these were the conditions governing the Title I program when Pennsylvania decided to participate. This was the law in effect during the years that Pennsylvania provided the Title I programs in those LEAs that were ventually subjected to the audit which

[4] 20 U.S.C.A. §241e (1974) (amended Supp. 1982).
[5] 20 U.S.C.A. §241f (1974) (amended Supp. 1982).
[6] 20 U.S.C.A. §241f (1974) (amended Supp. 1982).
[7] 20 U.S.C.A. §241j (1974) (amended Supp. 1982).

formed the basis of the Commissioner's claim against Pennsylvania. This was the law that was in effect when the audit was conducted, when the auditors' report and recommendations were issued, when the Office of Education's final determination was made against Pennsylvania, and when proceedings commenced before the Title I Audit Hearing Board. The Third Circuit's decision in this case is confined strictly to this very narrow and limited area of law: Title I of the Elementary and Secondary Education Act of 1965 as it existed prior to the Education Amendments of 1978.[8]

It is the 1978 Amendments which the petitioner cites as the law controlling in the instant case and as statutory authority for the agency's action in demanding repayment for programs concluded prior to 1973. Yet it is the law that is in effect at the time the program money is accepted and the alleged infractions occur that must be examined to uncover support for the sanctions sought to be imposed. Amendments passed in 1978, five years after the programs in question were concluded and the federal money disbursed, cannot be hailed as authority to demand retroactively repayment of money long since expended. Pennsylvania had no clue when it expended its Title I funds in good faith that it would be liable for repayment of those funds when, years later, the federal agency asserted several LEA programs failed to conform exactly with every detail of the regulations. That the agency should utilize such a penalty, rather than withholding funds prospectively until compliance was achieved as was

[8] The Title I statute has been amended regularly by Congress, but the basic enforcement scheme was constant from the enactment of Title I in 1965 to the Education Amendments of 1978.

clearly required by the statute, could not have been anticipated by the State.

This Court recently stated in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), that conditions in federal grant-in-aid programs must be voiced unambiguously:

> our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). The clear statement by this Court, that a state cannot be held to secret conditions in a grant program in which it innocently participated with a justifiable expectation that the statutory scheme in existence at the time the program was implemented was the controlling law, is consistent with well established rules against retroactive application of statutes. Absent unequivocal indications to the contrary within the

legislation, statutes are addressed to the future only and cannot interfere with or control preexisting rights. *Greene v. United States*, 376 U.S. 149 (1964).

This Court's consideration would, therefore, be limited to interpreting the application of enforcement provisions contained in a narrow section of Title I of the ESEA as it existed prior to 1978. The Court's review could only affect Title I audit cases which occurred during that limited period and which have not already been decided or otherwise settled. The Court's decision would thus have minimal utility as precedent in future cases since it would apply only to a small and decreasing number of disputes. Since the situation presented by this case is unlikely to repeat itself, evaluation of the merits of this matter by this Court would not resolve any issue of special importance. Sup. Ct. R. 17.

2. Petitioner urges this Court to grant certiorari in order to resolve a conflict between the Third and Fourth Circuit Courts and to resolve it consistently with the Fourth Circuit decision. The opposing results reached by the two Circuits, however, are not of such significance as to require the intervention of this Court to achieve a resolution.

Initially it must be noted that the asserted conflict was not the result of the considered decision of one Circuit Court to reject the view of another. Rather, the difference in opinions arose unawares since the two decisions were issued virtually simultaneously, within two days of each other. The Fourth Circuit, therefore, did not have the benefit of the reasoning of the Third Circuit in making its decision.

Furthermore, the Fourth Circuit had previously decided a Title I audit case adversely to the state without considering the legal arguments which formed the basis of the Third Circuit's decision. *New Jersey v. Hufstedler*, 662 F.2d 208 (3rd Cir. 1981); *West Virginia v. Commissioner of Education*, No. 79-1338 (4th Cir. 1980) (unpublished per curiam) (App. A, *infra*, p 1a). The Fourth Circuit may well have considered itself bound by its prior decision finding a liability for repayment, and found itself constrained by this precedent to uphold the authority of the agency. When the issues considered by the Third Circuit were finally and belatedly raised in the Fourth Circuit's second case, the Court could have been influenced by its prior decision to give the arguments less than their proper weight.

Of greater importance, however, is the Fourt Circuit's failure to apply this Court's decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), in reaching its decision. Without the guidance of *Pennhurst*, and with the precedence of its previous, unpublished decision, the Fourth Circuit was not informed as to the law underlying the issues it was deciding. The Fourth Circuit's decision was not well considered and, although its holding is in opposition to that of the Third Circuit, does not represent a conflict such as requires resolution by this Court.

3. The decision of the Third Circuit is restricted to the narrow issue of the authority of the Office of Education to demand payment under Title I of ESEA as it existed prior to 1978. Application of this decision to other federal grant-in-aid programs is not likely unless a similar enforcement structure can be shown to be part of the statutory scheme in those programs. The petitioner's

allegations of dire effects on other agencies' audit authority is unsupported by citation to comparable statutes which would be subject to the same interpretation. Similarly, allegations of challenges to audit repayments by other grant recipients stimulated by the decision below are based on information and reports personal to the petitioner and are not supported by the record in this case or any verifiable authority.

The petition expresses fears that disruption in the agency's preferred method of enforcement by means of repayment will result in delay and confusion and imperil huge amounts of uncollected claims. According to the GAO report cited in the petition in support of this contention,[9] delay and confusion is already rampant in agency enforcement proceedings.

Furthermore, allegations that huge amount of uncollected audit claims are at stake are misleading because they are based on inflated audit figures. Total amounts claimed by the auditors are inevitably reduced due to such considerations as the application of appropriate statutes of limitations or inability to support factually alleged misexpenditures. In the present case, the auditors' initial recommendation with regard to Pennsylvania's Title I program was for the payment of over $10,000,000.00. After consideration by the agency and application of the statute of limitations, the amount was reduced to $422,424.29.

Additionally, settlement of Title I audit cases arising prior to 1978 is continuing to occur and settlement figures are a small fraction of the original amount claimed by

---

[9] Comptroller General, Federal Agencies Negligent in Collecting Debts Arising From Audits (1982).

the auditors to be owing. The petitioner's fears that the enforcement of all grant programs will be jeopardized and that vast sums of money will be lost result from an overreaction to one adverse decision in a single grant program operated for a limited period of time.

The far reaching effects which petitioner envisions emanating from the Third Circuit's decision are illusory. Each audit case has to be decided on its own facts pursuant to the controlling law. As Richard Cappalli states in his treatise *Rights and Remedies Under Federal Grants* 98 (1979):

> Each grant program is authorized and established independently of others, with its own set of rights and duties. Thus, noncompliance must be judged on a program-by-program basis.

Because of the variation in the statutory schemes governing federal grant programs, any challenges to agency authority to enforce grant conditions have to arise on a case-by-case basis regardless of the Third Circuit's opinion, and regardless of the decision of this Court in reviewing it.

Similarly, the allegation that the decision below would open the floodgates of litigation is overstated. If the method of enforcement through repayment which the agency has appropriated unto itself in this case is determined to be unauthorized, petitioner foresees an alarming multitude of grantees in other programs asserting their rights in court. Whether the absence of such authority would be found in any grant statute other than Title I still remains to be seen; but even if it were the case, the argument is a poor one. The agency's chosen method of enforcement may be to its liking but, if it is not what Congress provided for in the authorizing statute, adminis-

trative convenience will not save it. Expediency is not a reason to second-guess Congress. By overreaching its statutory authority, the agency is substituting its own judgment for that of Congress and assuming for itself the prerogatives of the legislative branch of government.

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

By: MARGARET HUNTING
Deputy Attorney General
EMOGENE L. TREXEL
Assistant Counsel

Office of Attorney General
1545 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-5050

Dated: July 14, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1338

The State of West Virginia,

Petitioner

versus

Commissioner of Education, Office of Education, Department of Health, Education & Welfare,

Respondent

Petition for Review of Order of Commissioner of Education, Office of Education, Department of Health, Education and Welfare

Submitted October 1, 1980; Decided November 4, 1980.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, Circuit Judge

(Chauncey H. Browning, Attorney General, F. Layton Cottrill, Jr., Assistant Attorney General on brief) for Petitioner; (Robert J. Arnot, Philip H. Rosenfelt, Educa-

tion Division, Office of the General Counsel, Dept. of HEW on brief) for Respondent.

PER CURIAM:

West Virginia seeks review of a final action of the Commissioner of Education finding that the state misspent $63,026 in Title I education funds and requiring repayment. We need not resolve the difficult problem of this court's jurisdiction because we find the state's position on the merits unpersuasive.

The state argues that a variation in the amount demanded by the Office of Education abrogated the adequacy of its notice of the issues before the Title I Audit Hearing Board, whose position the Commissioner adopted. The HEW Audit Agency concluded in 1975 that $63,026 had been misspent. The Office of Education only demanded repayment of $53,710, however, when the state submitted evidence that $9,316 of the questioned expenditures were proper. In 1977, the Office of Education reexamined the submission and added a claim of $9,316, bringing the total sum demanded to the amount recommended by the Audit Agency. The state had sufficient notice of the issues and amount demanded to formulate an informed response in 1975. The state sparked the variation in the demand, and the claim presented to the Title I Audit Hearing Board was fixed over nine months before the Board issued its decision at the amount originally asserted. West Virginia was afforded notice adequate to prepare its response.

The state's other contentions are similarly unpersuasive and do not merit discussion.

PETITION DENIED.